

Cornell Law Review

Volume 74

Issue 2 January 1989

Article 2

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Recommended Citation

Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 Cornell L. Rev. 256 (1989)

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BRINGING THE LAW TO LIFE: A PLEA FOR DISENCHANTMENT¹

Frank Michelman

In his 1985 Stevens Lecture, Professor Owen Fiss spoke out in protest against the Critical Legal Studies movement for promoting the idea that "law is politics."² Fiss lodged two related objections against any identification of law with politics.³ First, he found that this equation denies to law its claim to a special role in the community's public life, that of expressing and effectuating the community's considered and enduring "public values" as opposed to the transient preferences of persons occupying seats of influence or power.⁴ Second, Fiss found that equating law with politics denies to judicial determinations of legal meaning their claim to objectivity attained through participations in a special professional culture that is emphatically *not* just a continuation of ordinary politics by other means.⁵ To deny the professional autonomy—the discontinuity from politics at large—of judicial determinations of legal meaning, Fiss contended, is to make incomprehensible the claim for objectivity in those determinations, is to deny that law expresses value not preference, is to encompass the death of the law.

I want to affirm here the view that law is best understood as a form of politics. Only as thus understood, I believe, can law possibly claim to approach the expression of *public* values in any sense of that term consonant with the constitutionalist ideal of a government that is "of the people by the people" and, at the same time, a government "of laws and not of men [sic]."⁶ Politics, I contend, is the only avenue by which public values (insofar as we can speak at all of such matters) might possibly be determinable and accessible. Accordingly, I take issue with two aspects of Fiss's argument. I question that argument's resort to professional culture for the redemption of legal access to public values, but more fundamentally I

¹ This article is a revised version of my Stevens Lectures delivered in March 1988.

² Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 2, 9-10 (1986).

³ My reading of the argument of Fiss's Stevens Lecture draws on his other, related writings, including Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) [hereinafter Fiss, *Conventionalism*]; Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) [hereinafter Fiss, *Objectivity*]; and Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Foreword*].

⁴ See Fiss, *supra* note 2, at 8-10, 14.

⁵ See *id.* at 9, 11.

⁶ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

question its overly narrow conception of what politics might possibly be.

I cannot confidently say just how far my argument ought to be taken as speaking on behalf of Critical Legal Studies. I believe that many CLS adherents would agree with much of it. But I can also imagine that many of them—and many others, too—will find at least some of it to be impossibly unworldly, not so much a plea for disenchantment as an exchange of one spell for another.

Let us begin, then, with a distinction between two conceptions of the activity that we call “politics” and associate with both popular elections and the doings of representative assemblies. The first conception is one that current usage⁷ often calls “pluralist,” but that I will here call “instrumentalist.” Typical of an instrumentalist conception is Professor Fiss’s observation that “[l]egislatures . . . are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done.”⁸

In contrast stands what we may call a dialogic conception of politics, which is distinguished from an instrumentalist conception by two noteworthy features. First, a dialogic conception envisions—or perhaps one ought to say it idealizes—politics as a normative activity.⁹ It imagines politics as contestation over questions of value and not simply questions of preference.¹⁰ It envisions politics as a process of reason not just of will, of persuasion not just of power, directed toward agreement regarding a good or just, or at any rate acceptable, way to order those aspects of life that involve people’s social relations and social natures.¹¹

The second point about the dialogic conception of politics is

⁷ See, e.g., Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542-43 (1988).

⁸ Fiss, *Foreword*, *supra* note 3, at 10. It is not clear how, if at all, Fiss would differentiate “beliefs” about what “should” be done from “preferences” and “wants.” The context seems to require that “belief,” here, be an ultimately private, individualistic phenomenon in no way essentially dependent upon any intersubjective process or communicative action. Cf. Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1512-13, 1526-27 (1988).

⁹ My argument does not require belief that all the activity that we would descriptively identify as political does actually conform, or even that it ought always ideally to conform, to a dialogic model. It does require belief that Americans are capable of such a mode of politics, aspire to it, and sometimes achieve it. See Michelman, *Conceptions of Democracy: The Case of Pornography Regulation*, 56 TENN. L. REV. (forthcoming 1989) [hereinafter Michelman, *Conceptions*]; Michelman, *supra* note 8, at 1508-15.

¹⁰ See, e.g., Fraser, *Talking about Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies*, 99 ETHICS 291, 292-96, 311-13 (1989).

¹¹ See Michelman, *Conceptions*, *supra* note 9.

that it is pragmatic. By this I mean that it envisions political argument as a kind of ethical argument that is culturally and historically situated and conditioned but that also proceeds without foundations.¹² Pragmatic political argument is animated and constrained by a consciousness of its situation within, and answerability to, a public normative culture and history—within and to, if you like, a normative practice. The pragmatic argumentative style is not, however, a style of rationalistic or traditionalistic closure. Pragmatic argument does not proceed tightly or deductively from either a strongly deterministic view of human nature or a strongly static or authoritarian view of tradition. If pragmatic political argument does locate itself within a public normative history, it also adopts a critical and always potentially transformative attitude toward that history. It regards that history as always containing resources that can be applied to its own critical re-examination and, therefore, as always being ripe for the transformative exercise of what has been called interpretation,¹³ or internal development,¹⁴ or recollective imagination.¹⁵

Dialogic conceptions of politics belong to the same broad family of discourse conceptions as do some familiar and influential contemporary conceptions of *legal* or *judicial* argument, such as Ronald Dworkin's conception of law as both "integrity" (representing the community's commitment to "consistency in principle" in its treatment of its members)¹⁶ and "interpretation" (representing the community's commitment to critical self-revision).¹⁷ Not by accident, of course, do I present pragmatic normative dialogue as a conception of politics, whereas others present something very like it as a conception of law or adjudication.¹⁸ For I believe that, but for one wrong and indefensible turn in his own inquiry into the question of "how law is possible,"¹⁹ we should have found among those others the same Owen Fiss who in his Stevens Lecture so strenuously objected to confusing law with politics.

For Fiss, the Constitution, regarded as law, is "an embodiment of a public morality."²⁰ It is not an outcome of a strategic interplay of preferences. It is, rather, an "authoritative" expression of "pub-

¹² See D. HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* (1985); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

¹³ M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987).

¹⁴ R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 18-19 (1986).

¹⁵ See Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988).

¹⁶ See R. DWORKIN, *LAW'S EMPIRE* 164-75, 211-15 (1986).

¹⁷ See *id.* at 189, Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982).

¹⁸ See Michelman, *supra* note 8, at 1513-15, 1528-29.

¹⁹ Fiss, *Conventionalism*, *supra* note 3, at 189.

²⁰ Fiss, *supra* note 2, at 14. The following account of Fiss's views is drawn from *id.*;

lic values and ideals.”²¹ Since, as Fiss argues, all expressions, however authoritative, are open to interpretation—indeed they are inert pending interpretation—the constitutional adjudicator’s role cannot be one of passive or mechanical transmission of values authorially written into the Constitution. It must, rather, be one of active elucidation of the meaning of constitutional values. The constitutional adjudicator must somehow both observe and respect constitutional values as authoritative and, at the same time, participate in their making. “[I]nterpretation is a process of generating meaning;”²² it is “a dynamic interaction between text and reader” that allows the judge “a creative role.”²³

Creative indeed! The creation in which the active constitutional adjudicator participates is, Fiss says, the creation of nothing less than *us*—us as a normative community, us as a group constituted by a narrative practice. This is true, Fiss believes, because the values embodied in the Constitution’s clauses on equality and liberty are the ones that “give our society an identity and inner coherence—its distinctive public morality;”²⁴ thus they are, in the deepest possible political sense of the word, public values. And yet they are also values whose meaning always awaits judicial elucidation. Fiss is explicit about this community recreating, this interminably Promethean role of the constitutional adjudicator: “[L]aw appears as generative of public values as it is dependent upon them. The Warren Court and the transformative process that it precipitated in American society not only presupposed a belief in the existence of public values but was also responsible for it.”²⁵

We see that actively creative constitutional adjudication is, for Fiss, required by the nature of human language and communication.²⁶ But that is not all that Fiss has to say in defense of a morally generative role for constitutional adjudicators. He also, although less explicitly, finds such a role to be required by a certain theory of political freedom to which he evidently subscribes.

Constitutionalism is that theory.²⁷ Constitutionalism as normative political theory is characterized by its dual commitments to a

Fiss, *Conventionalism*, *supra* note 3; Fiss, *Objectivity*, *supra* note 3; Fiss, *Foreword*, *supra* note 3.

²¹ Fiss, *supra* note 2, at 8, 14. See Fiss, *Foreword*, *supra* note 3, at 1-2.

²² Fiss, *Objectivity*, *supra* note 3, at 743.

²³ Fiss, *Conventionalism*, *supra* note 3, at 180-81.

²⁴ Fiss, *Foreword*, *supra* note 3, at 11.

²⁵ Fiss, *supra* note 2, at 15.

²⁶ Cf. Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. (forthcoming 1989) (arguing from Wittgenstein’s analysis of rules as social practices that every purported act of rule-application is also, necessarily, an act of rule-creation).

²⁷ What follows is my own interpretation of Fiss’s thought. He has not explicitly analyzed the notion of constitutionalism in the terms I propose.

government of laws and to self-government.²⁸ The first of these commitments demands that the effective institutionalized orderings of social life proceed (using Fiss's terminology) from values and not mere preferences. The second would seem to demand that the values informing those ordering be, in some appropriate sense, *our* values—ours collectively, all of ours. So far as I can discover, Fiss has never quite explicitly affirmed a connection between a constitutionalist commitment to popular self-government and his notion of law as an expression of "our public values," although he has come close.²⁹ That notion does, all the same, require that there must be some point, some moment in constitutional practice, at and from which *values* that are (in some sense) *public* arise and enter into the practice.

Fiss evidently takes the view that public values cannot enter the system from any point that is a theater of politics and hence, by his understanding, not of law.³⁰ This must be true, in Fiss's view, because politics just *is* activity directed toward the registration of preference and not the determination of value.

The instrumentalist description of politics evidently holds, for Fiss, even as to the politics of constitution-making—the political activity of constitutional framers and ratifiers.³¹ We can see this in his response to the familiar charge of "counter majoritarian!" against the creative style of constitutional adjudication he favors. The gist of that response is that "the counter majoritarian dilemma" is not peculiarly a bane of creative constitutional interpretation, but rather is "pervasive and attends no less upon the interpretive pursuit of meanings intended by the framers."³²

Fiss says that while the judicial role is "trivialized" under such a self-effacing conception of it, power is not thereby reserved from the judiciary for "the contemporary majority," but rather "is . . . given to the framers."³³ A question not addressed is why this very sort of shift of authority from an unelected judiciary to constitutional framers and ratifiers ought not to count as profoundly supportive of self-government.³⁴

An answer consistent with Fiss's generally jaundiced view of

²⁸ See Michelman, *supra* note 8, at 1499-1503.

²⁹ See Fiss, *Foreword*, *supra* note 3, at 1: "[Constitutional] values determine the quality of our social existence—they truly belong to the public—and as a consequence, the range of voices that give meaning to these values is as broad as the public itself."

³⁰ See Fiss, *supra* note 2, at 9 (equating the view that law is "politics in another guise" with denial of "the distinctive claim of law as a form of rationality").

³¹ But see Michelman, *Conceptions*, *supra* note 9; Michelman, *supra* note 8, at 1510-13.

³² Fiss, *Conventionalism*, *supra* note 3, at 181-82.

³³ *Id.* at 182.

³⁴ For an argument as to how it might so count, see Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013-31 (1984).

politics would be that the popular politics of constitution-making is still politics—presumptively no less a manifestation of will and no more one of reason than the ordinary politics of “the contemporary majority.” On that understanding, we would face an inescapable choice between creative judicial constitutional interpretation and subjection to *someone’s* despotic politics of preference. For judges to decline judicial review entirely would simply transfer power from the judge to a political (i.e., preferential) majority of our contemporaries. By the same token, Fiss apparently thinks, for judges to try to construe constitutional clauses “mechanically,” according to their original meaning as they came from the framers, would (insofar as the effort could succeed) simply cast us into subjection to the preferential politics of a past generation.³⁵

It would follow that nothing could possibly stand between us and the despotism of “men”—nothing could possibly shield us against subjection to each other’s preferences—save actively creative interpretation by judicial constitutional adjudicators, which is what Fiss calls “law,” because *all* the rest of the system is politics and politics is just the registration of preference. And so, Fiss concludes, it must fall to judges as constitutional adjudicators to be the organs—even the generators—of the public values upon whose effective presence the whole point of constitutionalism depends. Adjudication, then, cannot itself be either a form of self-indulgent, preferential politics or a form of slavish rule-following. Adjudication must be rational and objective but also critical and creative. That sounds like a hard prescription to fill. To explain how it can be met is to explain, in Fiss’s phrase, “how law is possible.”³⁶

Many have sought the answer to that question in some form of natural law theory. Others have begun—or, doubtless better, begun again—to seek it in the idea of normative pragmatic political dialogue.³⁷ Fiss takes neither of those paths. He seeks the answer, rather, in what he calls conventionalism and in what I (for my own no doubt tendentious purposes) have chosen to call professionalism. As Fiss put the matter in his Stevens Lecture:

³⁵ The point would hold regardless of whether the claim for relief against the action of a contemporary majority was granted or denied. At issue in every constitutional case is a claim for protection or relief against the action or inaction of an effective, contemporary legislative majority. The aim of originalistic constitutional adjudication is to hand over to the framers the power to determine what particular schedule of protections and reliefs our constitutional regime shall contain. The framers would be determining refusals as well as grantings of relief.

³⁶ Fiss, *Conventionalism*, *supra* note 3, at 189.

³⁷ See, e.g., Cornell, *supra* note 15; Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Michelman, *supra* note 8; Radin, *supra* note 26.

[J]udges are insulated from the political process and are required to engage in a special kind of dialogue over the meaning of [our public] values. This dialogue is arduous and taxing, at times almost beyond the powers of anyone,³⁸ but it is an essential part of the process through which a morality evolves and retains its public character. . . .

. . . [W]hat the law or objectivity requires or even aspires to . . . is [not deductive determinacy but just] that judges be constrained in their judgment, and that they certainly are. . . .

. . . [Judges are] public officials situated within a profession, bounded at every turn by the norms and conventions that define and constitute that profession. . . . Guided by years of training and experience, they read earlier cases, and sense which way the law is moving. They consider the role of the state . . . in the life of the nation They also know what constitutes a good reason for distinguishing [one case from another] or for deciding the case one way or another. In sum, the [judges] are disciplined in the exercise of their power. They are caught in a network of so-called 'disciplining rules' which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which the [judges] are part.³⁹

Let us now consider two somewhat contrasting senses in which the word "public" may be used in a phrase like "public values." A value is public in what we may call the *epistemological* sense if it has the character of objectivity, or intersubjectivity; that is, it is public if it has the quality of being demonstrable to persons other than its initial proponent in a way that leads to its recognition and acceptance by those persons—persons who, we can therefore conclude, are co-participants with the proponent in some discursive or argumentative practice constituted by discourse norms that they all accept. A value is public in what we may call the *political* sense if it is justifiably ascribed to a political community, as that community's value. Straightforwardly, such an ascription is justified when the community has adopted the value by some collective process that we can recognize as appropriate to the adoption of values on the community's collective behalf.⁴⁰

It seems obvious that a value can be public in the epistemological sense without being public in the political sense. This can come about in two ways. First, the community of participants or practitioners for whom the value is epistemologically public—the group

³⁸ The judge is not only Prometheus but Hercules, too. See R. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 105 (1977).

³⁹ Fiss, *supra* note 2, at 8, 11.

⁴⁰ We may take it that a clear case would be a law duly enacted in accordance with a recognizably democratic, constitutionally prescribed procedure carried out in what I have called a dialogic spirit.

of persons commonly engaged in the discursive practice that validates the value—may not be coextensive with any political community. Second, the discursive practice itself, which defines its community of practitioners, may not be appropriate to the legislation (so to call it) of values on behalf of a political community. For example, the community of practitioners may be a community of scientists whose discursive practice centers around controlled laboratory experimentation. For another example—this one not so far afield from our topic—the community of practitioners may be the professional community of lawyers, whose discursive practice is what has been called, *inter alia*, *elegantia juris*.

In which sense of “public” might it be true that good-faith engagement in the discourse practice of a special professional culture would tend to ensure the publicness of the values issuing from that engagement? Are we talking here of the political sense of public or the epistemological sense of public?

As far as I can see, Fiss’s argument equivocates, crucially and fatally, on the meaning of “public,” just where it resorts to judicial professionalism to supply the requisite moment of objectivity to a value-generative process of constitutional adjudication. Fiss does not adequately explain how or why the doctrine emanating from professional legal convention will express values that are politically public. He does not adequately engage with the question of why values that are epistemologically public to the profession of law, or to its judicial branch, might safely be presumed consistent with the constitutionalist commitment to a government of the people by the people. His commendatory accounts of conventionalism tender no justification for his repeated naming of what issues from the assiduously cultivated professional practice of lawyer-judges as “our public values”—unless, of course, he is talking only to lawyers.

In fairness, we have to recognize that Fiss is driven to professional culture in search of an answer to a hard question: How is law possible? On his behalf, one might fairly ask where, if not in the professional culture and discipline of judges, we can hope to find the capacity for authoritative discernment and articulation of political-moral values (not preferences) that might be public, even in the weak sense of not being factionally or sectionally partisan, let alone the strong sense of their being, as Fiss perhaps too carelessly likes to say, “ours.” If “nowhere” is the answer, then it is too much to ask that the regnant values should also be literally “ours”—that is, should be public in what I’ve called the political sense. The better can be the enemy of the good, and perhaps being ruled by values ascribed to us by the disciplined discourse of a legal-judicial professional community is the best we can prudently hope for.

There is a word for those who obstinately will not take "no-where" for a conversation-stopping answer, even when it might be true. That word is "utopian." Here is a sample of its use in Professor Fiss's Stevens Lecture:

[O]nce Professor Michelman . . . insisted that while there could never be a right answer in the law, there could be (indeed must be) right answers in morals. This view . . . seems to be at odds with common intuitions. Given the institutional apparatus of the law, and the shared understandings that bond and animate the profession, I think it far more likely for there to be right answers in the law than in morals. Of course, [the notion of there being a right answer, or of there being the force of the better argument, in] morality does not require 'the compulsion of a transcendent rule,' to use a phrase of Michelman's, but neither does [the comparable notion with respect to] law. It requires only constrained judgment. An insistence upon the contrary, and an attempt to depict [the notion of an autonomous, objective, and trans-political] law in other terms, as 'transcendent' . . . or 'unitary,' strikes me as a desperate but transparent attempt to . . . render credible a jurisprudence that rests . . . on a special strain of utopianism, one that rightly aspires to a true and substantive equality, but fails to accord a proper place for the institutional arrangements needed to bring that ideal into being.⁴¹

In order to see clearly what is here at issue between Fiss and myself, we need a more extended account both of my view that Fiss means to criticize and of his criticism. Here, then, cast as an imaginary speech by Fiss, is my understanding of his understanding of what our dispute is about. "The topic," I hear Fiss saying in my mind's ear,

"is constitutional adjudication. Michelman's thought about that is motivated by the idea of judicial action that contributes toward achievement of a certain substantial goal of equality. So he, like me, must understand constitutional adjudication as a process of advancing the realization of values attributed to the Constitution. Michelman isn't one of the nihilists who deny that there are any values to be attributed. His problem isn't nihilism, exactly; it's utopianism. Allow me to explain.

"However commendable his affirmative social-visionary aspiration for law, Michelman unfortunately joins forces with those who do destructively say that 'law is politics,' meaning thereby to deny that adjudication properly involves special forms of knowledge, reason, or argument that set it categorically and autono-

⁴¹ Fiss, *supra* note 2, at 13. I have inserted the bracketed material to clarify Fiss's meaning to readers coming fresh to the conversation. Fiss actually wrote "'transcendent,' 'mechanical,' or 'unitary'" where I quote him as having said "'transcendent' . . . or 'unitary' ". I do not recall ever having used "mechanical" in this context.

mously apart from political argument at large. I understand that among Michelman's motives for attacking this dualistic view of law's relation to politics is that he thinks it unnecessarily prompts judges to impede movement by others towards social justice or inhibits them from making their own movements in that direction.⁴² He thinks that a more openly and affirmatively politicized judicial style would best allow the judiciary to serve the end of social justice.

"It is precisely in this respect that I criticize Michelman's view as utopian. By utopian I mean that Michelman's view is not only unrealistically optimistic, but destructively so. The destructiveness lies in the aid and comfort that Michelman, like it or not, gives to legal nihilism. By denying not just the reality but even the ideal of the autonomous, trans-political character of adjudication, Michelman overlooks the need to imbue judicial acts, including those that would advance the cause of social justice, with the character (this doesn't mean just the semblance or the trappings but the authentic character) of objectivity required in order that those acts might command or, indeed, merit public respect.

"Denial of law's aspiration to trans-political autonomy might be justified, even so, if Michelman were correct in asserting that for judges engaged in adjudication the only alternative to engagement in ordinary-politics-as-usual is mechanical or passive submission to what he calls 'the compulsion of a transcendent rule.'⁴³ But he isn't. Michelman's error lies in equating adjudication's reach for trans-political objectivity with judicial automaticity. The error lies in leaving no conceptual space between unmodulated judicial preferential politics on the one hand and passive judicial submission to pre-existing, extra-judicial authority on the other hand. Michelman thus suppresses the possibility of an adjudicative practice that is both creatively active and trans-politically objective, deriving its objectivity not from deference to extra-judicial authority, but from the argumentative constraints of professional culture and institutional arrangements. Once this possibility of constraint by professionalism is recognized and admitted, there remains no need to court the delegitimation of adjudication by denying, as I once heard Michelman deny, that there are right answers in law, in order to hold open an active and creative role for constitutional adjudicators in the country's striving towards social justice."

What is my response to what we've just heard? In sum, I do find a form of normative argument occupying the space between

⁴² As evidence, Fiss might want to cite, *nunc pro tunc*, Michelman, *supra* note 8, at 1494-95, 1513-15; Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1340-50 (1987).

⁴³ For Fiss's possible reasons for such a concession, see *supra* text accompanying notes 24-36.

deference to authority and unmodulated preference. Only I class that form of argument as political rather than as anti-political. I regard it as continuous rather than as discontinuous with the law-determining process of self-governing people. It remains to be seen whether matters of consequence turn upon this difference in classificatory rhetorics.

I agree with Fiss that the constitutionalist ideal of a government of laws involves moments of participant objectivity or partial self-transcendence. But for reasons that must be obvious, it seems to me a serious misstep to locate this objectivity in a select group and its special professional inculcation into craft values. Such a turn to professionalism strikes me as despairingly anti-political, in the sense of anti-democratic. I would still rather seek (I don't say assuredly to find) the requisite moments of objectivity, compatibly with constitutionalism's other primal commitment to a government of the people by the people, within politics and not in flight from politics.⁴⁴

In order to understand how law is possible on constitutionalist premises—government of the people by the people/government of laws—one has to understand how politics can conceivably be a theater of law. That much seems implicit in the premises themselves.⁴⁵ It would follow that constitutional adjudicators can contribute to constitutional legality, if at all, only by understanding themselves as in some way participant in, without preempting, the politics of the people at large imagined as, at least on occasion, dialogic in character.⁴⁶ Yet in order to be consonant with the most salient features of the social practice we know as American constitutionalism, judicial participation in politics would have to take some form respectful of that practice's designed institutional differentiation between courts and legislatures. It would be hard to credit a professed judicial interpretation of American constitutional law that was not firmly premised on the idea of a secondary, not primary, political role for the courts. Constitutional adjudication must justifiably present itself as judicial "review."

I have argued elsewhere⁴⁷ that some restoration of judicial con-

⁴⁴ Obviously, I speak here not of the instrumentalist politics of preference, which is the only kind of politics that Fiss seems able to contemplate seriously, but of *dialogic* politics—politics as it ought to be, and can be, and sometimes is, and frequently is not; just as Fiss (whether or not utopianly) allows himself to speak of adjudication as it ought to be but—I suppose this will be admitted—not necessarily always is. Just as Fiss characterizes adjudication as he believes it must be capable of being if law is to be possible, with just that justification do I speak of a dialogic politics, of which adjudication is one institutionally specialized form, implied by the idea of a government of laws that is also a government of the people by the people.

⁴⁵ See Michelman, *supra* note 8, at 1499-1503.

⁴⁶ See *id.* at 1524-26.

⁴⁷ See, e.g., Michelman, *supra* note 42.

fidence in the possibility of good-faith, normative, pragmatic dialogue—whether you want to call it law or politics—would be good for our practice of judicial review. For present purposes, it does not much matter whether *you*, reader, agree with my argument. The more pertinent question is what Professor Fiss has to say about it—a question, as we shall see, about which we are not left completely to the vagaries of speculation.

Consider the argument as I have made it with specific reference to the Supreme Court's invocation, in *Buckley v. Valeo*,⁴⁸ of the first amendment against congressional regulation of political campaign contributions.⁴⁹ The argument proceeds from the observation that the challenged legislation might fairly be understood, at least *prima facie*, as a good-faith legislative effort to resolve a practical conflict of constitutional values in a way that maximizes the system of equal liberties of political expression.⁵⁰ This is not to deny that alternative explanations are possible or that the occasion might be one justifying the attitude toward democratic political machination that John Ely commends as "distrust."⁵¹ The argument is that within the total context of American constitutionalism it is inappropriate to parlay distrust into *automatic* invalidation of laws restricting some people's political speech, refusing inquiry into the effects of those laws upon the system of political speech as a whole, including its distributive dimension. Automatic invalidation and refusal of inquiry is flight from judicial responsibility. The flight response, the argument adds, is abetted by false belief in the need to choose between the self-indulgent or partisan politics of preference on the one hand and the disciplined objectivity of following a plain and simple, pre-ordained and externally dictated rule on the other hand.

A credible notion of pragmatic normative dialogue could thus serve as a point of mediation and *rapprochement* between politics and law. Recovery of confidence in the possibility of good-faith argument constrained by pragmatic reason-giving could fortify a court's willingness to believe that legislatures restricting constitutionally valued liberties sometimes do so in genuine and reasonable pursuit of constitutional values carrying greater weight in the circum-

⁴⁸ 424 U.S. 1 (1976) (per curiam).

⁴⁹ See Michelman, *supra* note 42, at 1345-50. More recently (if less confidently) I have proposed a somewhat similar argument against excessively doctrinaire (although arguably not finally indefensible) judicial invocation of the first amendment against laws seeking to regulate pornography as a form of sex discrimination. See generally Michelman, *Conceptions*, *supra* note 9.

⁵⁰ The literature supporting this approach to defense of the expenditure-limitations in *Buckley* is considerable. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 809-11 (1978).

⁵¹ See J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

stances.⁵² Of no less importance, such a recovery of confidence in normative practical reason could fortify, too, that same court's willingness to exercise (and its supporting sense of the country's willingness to accept) its collective judgment as to whether legislation under review merits judicial respect despite its restrictive impact on constitutionally valued liberties according to an appropriate "balancing test." Such a test might ask whether those who suffer restriction of their liberties by the challenged legislation can fairly be expected to accept that restriction as consonant with a good-faith exercise in dialogic politics in which all the contesting constitutional claims and values were fairly and sensitively considered.

Is the question thus posed suitable to a proper judicial role in a democratic constitutional system—secondary, but still responsible and not abdication? The answer partly depends on whether questions cast in such a form are amenable to the persuasive constraint of pragmatic political argument. Grant for the moment that they are.⁵³ Notice, then, that argument over such a question will engage a court's members in efforts, although at one remove, to interpret and elucidate the same conflicts, in the same contexts, among the same values (including the question of their relative weights in the circumstances) that presumably or hypothetically provided the grist for an enacting legislature's own dialogic-political mill. To that extent, the judicial question would be just what Fiss says we cannot name it without destroying the law's claim to respect as "a form of rationality," namely, "politics in another guise."⁵⁴

The odd thing is that Fiss seems to agree in all relevant aspects with my diagnosis and prescription for cases like *Buckley*. "The state," he has written, "... can act either as a friend or enemy of speech. . . ."⁵⁵ Constitutional adjudicators will serve us best by undertaking "... to recognize when [the state] is acting in one capacity rather than another,"⁵⁶ although the requisite judgments of practical reason will be debatable even to the point of "excruciation."⁵⁷ And consider upon what intellectual force Fiss lays the blame for currently blocking the judiciary from this, its proper work. He blames what he calls a capital-T "Tradition" of first amendment jurisprudence—a "tradition" in which the state is too automatically cast as the enemy of autonomy rather than the friend of democratic public debate and in which free speech is too automatically accorded

⁵² See Michelman, *Conceptions*, *supra* note 9.

⁵³ For discussion, see generally Michelman, *Whither the Rule of Law?*, 69 B.U.L. REV. (forthcoming 1989).

⁵⁴ Fiss, *supra* note 2, at 9.

⁵⁵ Fiss, *Why the State*, 100 HARV. L. REV. 781, 787 (1987).

⁵⁶ *Id.*

⁵⁷ Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1420-21 (1986).

a "peculiar status" of constitutional sanctity, as an ideological token of limited government.⁵⁸ "Crit" scholars, using a different vocabulary from Fiss's, might have chosen the term "reification" for the sort of obstructive intellectual force of which he complains. Or how about "bad conventionalism?"

Doubtless conventionalisms, like politics, can be both good and bad. Fiss may have in mind a "good," pragmatic judicial conventional practice rather than a "bad," reified one, a practice composed of just those "craft values" and "disciplining rules" that would prompt its judicial votaries to just the sort of good judicial politics that he and I both seem to be commending. Such a reading would at any rate help to square Fiss's commendations of judicial conventionalism with his commendations of a judicial style that I would call political. If that reading is rejected, then I cannot understand how the government of the people by the people can coexist with judicial conventionalism. If it is accepted, what becomes unclear is the basis for Fiss's claim to have found in judicial conventionalism a source of normative objectivity so special, so distinct from politics in general, as to warrant his distancing himself, by denunciation, from scholars who have been intent upon noticing adjudication's continuity with politics.

So I speak for bringing law back to politics and politics back to law. You will understand why I think of this as bringing law back to life. When it comes to disenchantment you may well, as I have said, think I have just exchanged one spell for another. I guess that would make you a nihilist, from my perspective. But that's not a very interesting remark.

⁵⁸ Fiss, *Foreword*, *supra* note 3, at 782-83, 785-86.